INDEX

	Page
Opinion below	1
Jurisdiction	1
Questions presented	2
Statute involved	2
Statement	3
Argument	4
Conclusion	11

CITATIONS

Cases:	
Delaney v. *United States*, 263 U. S. 586	11
Guy v. *United States*, 107 F. (2d) 288	10
Horn v. *United States*, 182 Fed. 721, certiorari denied, 219 U. S. 585	5
Kinard v. *United States*, 96 F. (2d) 522	4
Matheson v. *United States*, 227 U. S. 540	4
Owens v. *United States*, 58 F. (2d) 684, certiorari denied, 299 U. S. 540	4
Sparf and Hansen v. *United States*, 156 U. S. 51	5
Wells v. *United States*, 257 Fed. 605	5
Wood v. *United States*, 128 F. (2d) 265	6
Statute:	
Code of the District of Columbia. 1940 Ed., Title 22, c. 24 (Act of March 3, 1901, c. 854, 31 Stat. 1321, as amended by the Act of June 12, 1940, c. 339, 54 Stat. 347):	
Sec. 22–2401 [6:21]	2
Sec. 22–2403	4
Sec. 22–2404	3
Miscellaneous:	
Robertson and Kirkham, *Jurisdiction of the Supreme Court of the United States*, pp. 619, 675	10

In the Supreme Court of the United States

OCTOBER TERM, 1942

No. 260

WILLIAM T. MUMFORDE, PETITIONER

v.

UNITED STATES OF AMERICA

ON PETITION FOR A WRIT OF CERTIORARI TO THE UNITED STATES COURT OF APPEALS FOR THE DISTRICT OF COLUMBIA

BRIEF FOR THE UNITED STATES IN OPPOSITION

OPINION BELOW

The opinion of the United States Court of Appeals for the District of Columbia (R. 54–58) is not yet reported.

JURISDICTION

The judgment of the court of appeals was entered June 29, 1942 (R. 59). The petition for a writ of certiorari was filed July 28, 1942. The jurisdiction of this Court is invoked under Section 240 (a) of the Judicial Code, as amended by the Act of February 13, 1925 (R. 2), See also Rule XI of the Criminal Appeals Rules promulgated by this Court May 7, 1934.

QUESTIONS PRESENTED

1. Whether in a trial for first-degree murder the court committed reversible error in instructing the jury that it might find the defendant guilty of the lesser offenses of second-degree murder or manslaughter, when the instruction was given at his request and the jury found him guilty of first-degree murder.

2. Whether prejudicial error resulted from the admission in evidence, without objection, of testimony as to an incriminating statement made by petitioner at his preliminary hearing before a United States Commissioner.

STATUTE INVOLVED

The Code of the District of Columbia, 1940 Ed., Title 22, c. 24 (Act of March 3, 1901, c. 854, 31 Stat. 1321, as amended by the Act of June 12, 1940, c. 339, 54 Stat. 347) provides as follows:

> § 22–2401 [6:21]. *Murder in the first degree—Purposeful killing—Killing while perpetrating certain crimes.*
>
> Whoever, being of sound memory and discretion, kills another purposely, either of deliberate and premeditated malice or by means of poison, or in perpetrating or attempting to perpetrate any offense punishable by imprisonment in the penitentiary, or without purpose so to do kills another in perpetrating or in attempting to perpetrate any arson, as defined in section 22–401 or

22–402 of this Code, rape, mayhem, robbery, or kidnapping, or in perpetrating or in attempting to perpetrate any housebreaking while armed with or using a dangerous weapon, is guilty of murder in the first degree.

STATEMENT

Petitioner was convicted (R. 6) in the United States District Court for the District of Columbia on a one-count indictment (R. 5–6) charging the unlawful killing of one Fannie Cohen while attempting to perpetrate a robbery, and was sentenced to death by electrocution (R. 7–8), which is mandatory (D. C. Code, Sec. 22–2404).

It is not disputed that at about 10:30 on the night of February 15, 1941, petitioner, armed with a 38-caliber revolver, entered the dress shop of Fannie Cohen at 1512 U Street Northwest, in the District of Columbia, with the intention of committing a robbery; that the woman saw him and walked toward him and screamed; that he pulled the gun from his overcoat pocket and shot her; that she fell to the floor at his feet and he fled; and that she was pronounced dead ten minutes later (R. 29–31, 35, 38–41).

Petitioner testified that after entering the shop he abandoned his intention to rob and that when the woman screamed he pulled the gun "with the intention of stopping her screaming * * * and as I snatched the gun it went off" (R. 38).

An eyewitness to the crime testified that after the woman fell petitioner "reached over her body and grabbed at something" before he turned and fled. (R. 11).

ARGUMENT

I

Petitioner contends that he was entitled to acquittal unless he was guilty of murder in the first degree, for both the indictment and the proof precluded any possibility of his being convicted of anything less, and that therefore the court erred in charging the jury as to the lesser offenses of second-degree murder and manslaughter (Pet. 5).

It should first be noted, however, that it was petitioner, "seeking to obtain the instructions most advantageous to him" (Pet. 5), who advanced the theory that the jury might also bring in a verdict of second-degree murder[1] or of manslaughter (R. 46–47).[2] Hence, he is in no position to complain of the instruction. Cf. *Matheson* v. *United States,*

[1] The indictment would have supported a verdict of second-degree murder (*Owens* v. *United States*, 58 F. (2d) 684, 685 (App. D. C.), certiorari denied, 299 U. S. 540) if the killing had been with malice after the intent to rob had been abandoned, for section 22–2403 of the D. C. Code provides that "Whoever with malice aforethought" commits any homicide not defined as first-degree murder, "is guilty of murder in the second degree."

[2] An instruction precluding a verdict of manslaughter might have furnished grounds for reversal of the conviction. Cf. *Kinard* v. *United States*, 96 F. (2d) 522, 525 (App. D. C.).

227 U. S. 540, 543; *Wells* v. *United States,* 257 Fed. 605, 619–620 (C. C. A. 9); *Horn* v. *United States,* 182 Fed. 721, 738 (C. C. A. 8), certiorari denied, 219 U. S. 585. Furthermore, whether the charge as to lesser offenses should have been given has now become a purely theoretical question. Petitioner admitted at the trial that he entered the store with the intent to rob, and that he shot the deceased (R. 39–40). The only question for the jury was whether to believe his explanation that he had abandoned his original intention when the shot was fired and that the killing was accidental. This issue was sufficiently presented to the jury in the instruction complained of (R. 46–47), and the jury's refusal to accept his version was fully warranted in view of his previous admissions (see pp. 7–10, *infra*), and the testimony of the eyewitness to the crime. In other words, the jury, in response to the indictment and upon ample proof, has found petitioner guilty of first-degree murder, and nothing in the instructions complained of could have influenced that verdict. On the contrary, in view of the overwhelming evidence of his guilt of first-degree murder, the instruction as to lesser offenses was, as the court of appeals held, "wholly favorable to the defendant" (R. 57). Cf. *Sparf and Hansen* v. *United States,* 156 U. S. 51, 64.[3]

[3] Petitioner questions the adequacy of the definition of malice aforethought (Pet. 6), but since the record does not contain the summations of counsel there is nothing to contradict the trial court's conclusion—unchallenged at the trial—

II

Petitioner also contends that prejudicial error resulted from the admission in evidence of testimony as to an incriminating statement which he made to the United States Commissioner at his preliminary hearing, when he was not represented by counsel. The statement was to the effect that petitioner was not guilty of premeditated murder but of shooting the woman in an attempt to rob her (Pet. 6–10).

However, no objection was made to the admission of this testimony. Hence, even if it could be said that the statement was made under judicial "pressure,"[4] as was held in *Wood* v. *United*

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that "malice aforethought was properly defined by counsel" in summation to the jury (R. 49). He also asserts that the court failed to instruct as to "the possible verdict of 'not guilty'" (Pet. 6), but this claim is not borne out by the record. Such instructions were incorporated in petitioner's granted prayer No. 8, which his counsel read to the jury (R. 48) and which was supplemented by the court's subsequent instructions (R. 49–50), and petitioner requested no further enlargement thereof.

[4] It was pointed out in the Government's brief in the court below (pp. 6–7) that the charge to which petitioner was asked to plead at the preliminary hearing was that he killed the deceased with "deliberate and premeditated malice," and that following his statement a plea of "not guilty as charged" was entered. This is not shown in the record because petitioner did not question the admissibility of the testimony at the trial. One witness testified that petitioner said, "I am not guilty of premeditated murder, but I am guilty of the shooting in an attempt to rob the woman and shooting her" (R. 35); another testified that petitioner "said he was guilty of robbing and the shooting, but it was not premeditated"

States, 128 F. (2d) 265, 274 (App. D. C.), upon which petitioner relies (Pet. 6–10), he must, under the dictum of that case, be deemed to have waived the privilege against self-incrimination by his "failure to object when the plea [was] tendered in proof" (128 F. (2d) at p. 275). Moreover, as the court below held, it was "purely cumulative" (R. 58) of other admissions by petitioner, even more incriminating, which had already been received in evidence without objection. Thus Government witness Meyers testified that on the night of the shooting, in a cafe located a few blocks from the scene of the crime, petitioner told him that "he had shot the lady around there at the dress shop" (R. 20), and that, about two months later, at Police Headquarters, he heard petitioner state that "he went in there for money and that the reason he shot her was that she started to scream" (R. 21). Government witness Tolson, a police officer, testified that on March 25, 1941, while he was returning petitioner to the District from Rockingham, North Carolina, petitioner stated that:

> he did not mean to kill her, that he only went in there to get some easy money * * * that he had this gun on him and

(R. 36); and still another testified that petitioner stated, "I am guilty of attempting to rob her and of shooting her, but not a premeditated murder" (R. 37). Petitioner himself testified that "I told him [the Commissioner] I refused to plead guilty to the first degree because that would necessitate premeditation" (R. 43).

> was walking down the street looking for a place to hold up to get some easy money, and that this dress shop was the first place he came to that looked easy * * * that when he went into this store, this woman was about six feet from him out in the front of the counter, and that he had the gun in his right-hand coat pocket, with his hand on the handle of the gun, and that as he got all the way inside the door this woman started to scream and started to walk towards him * * * that he pulled the gun out and fired one shot and the woman fell to the floor, and he bent over her to go through her pockets, and then he started to run * * * that the reason he denied the charge in Rockingham was because he thought the fact that he had killed a white woman would cause them to lynch him, and that he wanted to get out of the state before telling the truth about it" (R. 26–27).

Tolson testified further that on the evening of March 26, 1941, at Police Headquarters, petitioner

> put on the reversible coat, put the gun in his right-hand pocket and demonstrated * * * how he walked in the store, pulled the gun, and fired the one shot

and that petitioner stated "I went in to rob the place, but I didn't mean to kill the woman" (R. 34). Tolson also identified a typewritten statement, signed by petitioner, dated March 26, 1941, and in which petitioner stated, *inter alia,* that:

I walked in the place and I had my hand in my overcoat pocket on the gun. When I went in there I had the intentions of going to get some money. When I walked in the lady I shot was standing about as far as from here to the radiator [indicating a distance of about six feet] she was not behind the counter. Just as I got inside the door she started toward the door screaming. I pulled my gun and fired one shot at her. I fired once. She fell right down at my feet. I bent down and started to go to her pockets, then I broke and ran out the door (R. 29–30).

* * * * *

She was walking toward me screaming. I think she was trying to get out the door where I was standing (R. 31).

* * * * *

Q. What part of her body did you aim for?

A. I didn't fire at any particular place. I just pulled the gun and fired toward her (R. 31).

* * * * *

Q. Why did you take this gun?

A. Well, I was not working, I didn't have no place to stay and I didn't have no money and I thought I'd use it to get me some easy money (R. 31).

In addition to the foregoing, petitioner testified at the trial that he went into the store because "I had the intention of robbing the place"; that

"after getting into the store I immediately decided to drop the whole idea and come out," at which time the deceased "was coming from the back of the place" (R. 39); that he pulled out the gun "when she started screaming" because "I thought by pulling the gun out she would stop screaming, that I would frighten her and she would stop screaming," and that "in snatching the gun the gun went off" (R. 40).

Accordingly, it is clear that, as the court below stated, the testimony now objected to "added nothing prejudicially" to the incriminating admissions theretofore received without objection "or indeed to the evidence given by the accused at the trial" (R. 58); and it can hardly be said, as was said in the *Wood* case, that it "may have clinched the case" against petitioner, 128 F. (2d) at p. 267.[5] As the same court declared in *Guy* v. *United States,* 107 F. (2d) 288, 290, "When guilt is clearly established by competent evidence, error in the admission or exclusion of other evidence * * * which does

[5] In any event, even if the decisions in the two cases were "diametrically opposed to each other," as petitioner asserts (Pet. 7), that would not warrant review by this Court, for "conflict or inconsistency between decisions of the same Circuit Court of Appeals ordinarily is not a ground for a writ, since the later in point of time is controlling." (Robertson and Kirkham, *Jurisdiction of the Supreme Court of the* United States, p. 619, and see p. 675).

not affect the substantial rights of the accused does not call for the reversal of a conviction."[6]

CONCLUSION

The decision below is correct. There is no conflict of decisions warranting review by this Court; nor is any question of general importance involved. It is respectfully submitted, therefore, that the petition for a writ of certiorari should be denied.

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AUGUST 1942.

[6] Petitioner assigns as error (Pet. 3), but does not argue, that the court below should have held that the evidence was "sufficient to show an abandonment of the robbery originally planned" and that "consequently the defendant was not guilty under the indictment as drawn." Whether petitioner abandoned his intention to rob was the only factual issue of any importance upon which there was any conflict in the evidence, and the jury's finding thereon was left undisturbed by two courts (cf. *Delaney* v. *United States*, 263 U. S. 586, 589–590). Petitioner was satisfied to leave the determination of this issue to the jury, for he did not question the sufficiency of the evidence at the end of the Government's case or at the end of all the evidence. Moreover, he made this issue pivotal in the prayers he submitted for instructions. (See, particularly, prayer No. 8 (R. 48), which was granted.)

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